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Nos. 87-205, 87-206 and 87-371

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA MINERS ASSOCIATION, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

STATE OF ALASKA, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

TRUSTEES FOR ALASKA, ET AL., CROSS-PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 6(i) of the Alaska Statehood Act provides that mineral interests in lands selected by the State of Alaska pursuant to Section 6(a) or (b) of that Act may be disposed of only by "lease," and that any lands or minerals disposed of in violation of Section 6(i) shall be forfeited to the United States in a suit brought by the Attorney General of the United States in the United States District Court for the District of Alaska.

The United States will address the following questions:

1. Whether respondents have the standing necessary to permit this Court to exercise jurisdiction under Article III of the Constitution.

2. Whether private parties such as respondents are barred by Section 6(i) from bringing an action in state court seeking a declaratory judgment that the State's mining laws governing the disposition of mineral interests in selected lands do not comply with Section 6(i).

3. Whether Alaska's mining laws violate the restriction in Section 6(i) of the Alaska Statehood Act that minerals may be disposed of only by a "lease" because they permit a person to extract "hard rock" minerals under a location system, similar to that established by the federal Mining Act of 1872, without payment of rents or royalties to the State.

4. Whether the restriction in Section 6(i) of the Alaska Statehood Act that permits minerals in lands selected by the State under that Act to be disposed of only by lease is limited to those lands that were known to be mineral in character at the time they were selected by the State from the United States.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. *The Statutory Framework*

Sections 6(a) and (b) of the Alaska Statehood Act authorized Alaska to select 103,350,000 acres of land from the vacant, un-

appropriated and unreserved public lands of the United States. 72 Stat. 340. The "primary purpose" of this grant "was to ensure the economic and social well-being of the new state" (86-206 Pet. App. B51 [hereinafter Pet. App.], citing *Udall* v. *Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969); *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980)). This case concerns the validity of the statutory scheme by which Alaska permits the extraction of so-called "hard-rock" minerals from lands selected pursuant to Section 6(a) or (b).

1. a. Both the Alaska Statehood Act and the state statutory scheme were enacted against the background of the distinction that then existed (and still exists) under federal law between the system of mineral *location* under the Mining Act of 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.*, and the system of mineral *leasing* under the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. (& Supp. III) 181 *et seq.* Under the Mining Act of 1872, " '[d]iscovery' of a mineral deposit, followed by the minimal procedures required to formally 'locate' the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26; as long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without paying any royalty to the United States, 30 U.S.C. § 28." *United States* v. *Locke*, 471 U.S. 84, 86 (1985). The 1872 Act also authorizes the claimant to obtain a patent by paying a nominal sum to the United States. 30 U.S.C. 29, 37; *Locke*, 471 U.S. at 86. By contrast, under the Mineral Lands Leasing Act of 1920, a person seeking to extract minerals from federal land may only lease the land, and he must pay an annual rental fee and royalties on any minerals extracted. 30 U.S.C. (& Supp. III) 207(a), 212, 226(b) and (d), 241(a), 262, 283. The location system under the 1872 Act applies to so-called "hard rock" minerals, such as gold, silver, copper, lead, zinc, tin and tungsten, while the leasing system under the 1920 Act applies to coal, oil, gas, oil shale, phosphate, sodium and potassium. 30 U.S.C. 181.

The Alaska Statehood Act and the state statutory scheme also were enacted against the background of provisions in other statehood acts that granted lands for school purposes. See *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 1-4. Under those other acts, this Court held that lands that were known to be mineral in character at the time of statehood were excluded from the school grants unless Congress expresssly provided otherwise. *United States* v. *Sweet*, 245 U.S. 563 (1918); *Wyoming* v. *United States*, 255 U.S. 489, 500-501 (1921). In response, Congress passed the Act of January 25, 1927, ch. 57, § 1, 44 Stat. 1026-1027, 43 U.S.C. 870, which extended the school grants to embrace numbered sections that are mineral in character. *Andrus* v. *Utah*, 446 U.S. 500, 509 (1980). The 1927 Act further provided that the mineral rights in such lands must be retained by the State and "shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools" (43 U.S.C. 870(b)).

Section 6(i) of the Alaska Statehood Act (72 Stat. 342) makes applicable to the lands granted to Alaska a set of restrictions that are expressly patterned after those in the 1927 School Lands Act. See Pet. App. B30-B32, B39-B46; *State* v. *Lewis*, 559 P.2d 630, 636 (Alaska), appeal dismissed, 432 U.S. 901 (1977). Section 6(i) provides:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate pro-

> ceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

The only distinction between Section 6(i) and the 1927 Act is that Section 6(i) does not require that "the proceeds and rentals and royalties" of mineral leasing be utilized only for school purposes, since the basic grants under Section 6(a) and (b) of the Alaska Statehood Act are not limited to school purposes.

b. The requirement that minerals on selected lands be disposed of only under a "lease" encountered substantial opposition from mining interests and others in Alaska when the question of statehood for Alaska was under consideration by Congress in the mid-1950s. This opposition is reflected in the text and background of the Alaska Constitution, which was proposed by a Convention in 1956 and approved by the people of Alaska later that year. See *Lewis*, 559 P.2d at 636. The basic restrictions of the 1927 School Lands Act had already been incorporated into the pending Alaska statehood bill when the Convention convened. Pet. App. C10; V. Fischer, *Alaska's Constitutional Convention* 134 (1975). As the Alaska Supreme Court explained, those restrictions "were controversial because they signalled a change from the existing location-patent system to a leasing system" for hard-rock minerals (Pet. App. B46). As a result, the Alaska Constitution, as approved by the voters in 1956 and still in effect, retains the distinction between mineral leasing and mineral location. Article VIII, § 12 states that the Legislature "shall provide for the issuance, types and terms of leases" for oil, gas, coal and other minerals that were then subject to the Mineral Lands Leasing Act of 1920 or the Alaska Coal Leasing Act of 1914, ch. 330, 38 Stat. 741. But Article VIII, § 11 provides that "[d]iscovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this Constitution by the people of Alaska, were subject to location under the federal mining laws."[1]

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[1] Section 11 further provides that continuation of rights in those minerals "shall depend upon the performance of annual labor, or the payment of fees,

The Alaska Supreme Court explained that Art. VIII, § 11 was included by the Convention at the instance of delegates who favored a location-patent system for hard-rock minerals, in the hope that Congress might recede from the universal leasing requirement in the pending bill (Pet. App. B49). " 'Most [delegates] also saw the provision as a demonstration to miners * * * that any restrictions applicable to alienation of mineral lands were being imposed from outside and were not the convention's own doing' " (*ibid.* (quoting V. Fischer, *supra*, at 134)). But because the benefits of statehood were thought to outweigh the disadvantages of the "lease" requirement, the Constitution proposed by the Convention and approved by the voters in 1956 expressly consented in advance to such terms or conditions as Congress might attach to the grant of federal lands to Alaska (Art. XII, § 13; see Pet. App. B46-B47 & n.22).

Congress did not recede from the universal "lease" requirement when it enacted Section 6(i) of the Statehood Act in 1958. However, in light of the opposition to that requirement in Alaska,[2] Congress provided in Section 8(b) of the Statehood Act that Alaska's admission to the Union was conditioned upon the voters' consent at a special election to all provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska" (72 Stat. 344). Section 8(b) further provided that if the voters approved this proposition, the Constitution of Alaska "shall be

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rents, or royalties, or upon other requirements as may be prescribed by law," and that "[d]iscovery and appropriation [of such minerals] shall initiate a right * * * to patent of mineral lands if authorized by the State and not prohibited by Congress."

[2] After the proposed Constitution was approved by the people of Alaska in 1956, petitioner Alaska Miners Association (AMA) urged Congress to recede from the mandatory mineral leasing provision now embodied in Section 6(i) and instead to permit the State to implement the mineral location system contemplated by Art. VIII, § 11 of the proposed Constitution for minerals that were subject to location under the federal mining laws. See *Statehood for Alaska: Hearings on H.R. 50, et al. Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 217-245 (1957).

deemed amended accordingly" (*ibid.*). The people of Alaska voted in favor of the proposition at a special election on August 26, 1958 (559 P.2d at 639), and Alaska was admitted to the Union on January 3, 1959.

2. In the early years of statehood, state officials did not interpret the "lease" requirement in Section 6(i) to apply to *all* lands selected by the State pursuant to Section 6(a) and (b) of the Statehood Act. Rather, they interpreted it to apply only where the surface estate was sold or otherwise disposed of by the State, with a reservation of mineral interests to the State. Under that construction, Section 6(i) did not restrict the manner in which the State disposed of minerals in those selected lands (presumably the vast majority) that were retained by the State, and the State therefore was free to apply a mineral location system to such lands. See *Status of Mining Claims Staked on State Selected Lands,* 1981 Alas. Att'y Gen. Op. 113, 154-155 (1981) [hereinafter 1981 Alas. Att'y Gen. Op.].

The State's narrow construction of Section 6(i), and the distinction embodied in the Alaska Constitution between mineral leasing and mineral location, were implemented in a law enacted by the Alaska Legislature in 1959 to govern the administration of lands owned by the new State. 1959 Sess. Laws of Alaska (SLA) 229-247. The 1959 legislation provided for the leasing of state lands and the payment of rents and royalties for the extraction of coal, oil, gas and other minerals that are governed by the Mineral Lands Leasing Act of 1920. Art. VIII, § 3, 1959 SLA at 241-244; see Alaska Stat. §§ 38.05.135-38.05.184 (1984). But "all minerals [that were] subject to location under the mining laws of the United States" were made subject to discovery, appropriation and location under the relevant sections of Alaska's mining laws, which in turn had been derived directly from the federal mineral location laws. Art. IX, § 1, 1959 SLA at 246.[3] The only difference was that a claimant under the State's location system could not receive a patent to

[3] The laws of the United States relating to mining claims were extended to the Territory of Alaska by Section 26 of the Act of June 6, 1900, ch. 786, 31 Stat. 329, 30 U.S.C. 49a. The State's mining laws are now codified at Alaska Stat. §§ 38.05.185-38.05.275 (1984).

the mineral interests. However, as required even by the State's narrow construction of Section 6(i), minerals that were reserved to the State when the surface estate in selected land was sold by the State could be extracted only under a lease, on terms approved by the Commissioner of the Department of Natural Resources. Art. IX, 1959 SLA at 246.

3. a. Section 6(i) became the subject of considerable interest in Alaska at the beginning of this decade, when the Attorney General of Alaska undertook an extensive analysis of the scope of Section 6(i) for the Commissioner of Alaska's Department of Natural Resources. 1981 Alas. Att'y Gen. Op., *supra*. In his final opinion, rendered in 1981, the Attorney General concluded, inter alia, that state officials had erred in interpreting the "lease" requirement in Section 6(i) to apply only to mineral interests that were reserved to the State when the surface estate was sold (*id.* at 156-157). In his view, the "overwhelming weight" of the legislative history established that "the leasing restriction [in Section 6(i)] was to apply to all mineral lands" (*ibid.*), while "[t]he approach offered by state officials was not contemplated by anyone prior to passage of the Statehood Act" (*id.* at 157).[4] However, reversing the position he had taken in a publicly circulated draft of the opinion (*id.* at 158), the Attorney General further concluded that Section 6(i) applies only to lands that were known to be mineral in character at the time they were selected by the State (*id.* at 157-166).

b. In response to the Attorney General's opinion, the State Legislature revised the State's mining laws in 1981. 1981 SLA ch. 108. The 1981 amendments provide that hard-rock minerals must be extracted under a lease, even on lands retained by the State. However, this special leasing requirement for hard-rock minerals applies only if the Commissioner first finds that the lands in question were known to be mineral in character at the time they were selected by the State. That finding can be made only through the issuance of a formal land classification order (Alaska Stat. §§ 38.05.185, 38.05.205), and we have been in-

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[4] We believe that the Attorney General's interpretation of Section 6(i) in this respect is clearly correct, and petitioners do not challenge it here.

formed by the Office of the Attorney General of Alaska that no such classification orders have been issued. As a result, even on lands that were known to be mineral in character at the time they were selected, hard-rock minerals continue to be governed solely by the State's mineral *location* system, which does not provide for the payment of rents or royalties to the State.[5]

Moreover, the special hard-rock leasing provisions (unlike the State's general mineral leasing laws applicable to oil, gas and coal) do not provide for the payment of royalties to the State for the extraction of minerals. And although the special leasing provisions do prescribe an annual rental fee, that fee is set at the amount of annual labor necessary to maintain a mining location claim (now $200 per year, Alaska Stat. § 38.05.210(a)), and the lessee is entitled to a credit against his rent for the labor actually performed (§ 38.05.205(b)). The net effect of these provisions is that even if the Commissioner should trigger application of the special hard-rock leasing provisions in the future, the State still would not realize any cash rents or royalties for the leasing or extraction of hard-rock minerals from those lands.

c. In 1982, the Alaska Legislature again amended the State's hard-rock mining laws in response to the Attorney General's 1981 opinion. As explained by the Attorney General in a June 3, 1982 opinion letter to Governor Jay S. Hammond,[6] the 1982 amendments responded to the concern that the State's mineral location system does not satisfy the "lease" requirement in Section 6(i) because it does not provide for particularized review by the State of individual mining claims and does not contain a mechanism by which the State conveys a mining right or other interest to each claimant. The Attorney General observed that although the granting of rights in a special tract "may not be a necessary element of a leasing system, it could be the deciding

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[5] State law also provides for the mining of hard-rock minerals under a lease if the Commissioner determines that the mining would conflict with potential uses of state land (Alaska Stat. § 38.05.185). This provision is not addressed to Section 6(i), and we have been informed by the Office of the Attorney General of Alaska that the only mining leases issued under Section 38.05.205 have been premised on a finding of conflicting uses.

[6] We have lodged a copy of this opinion letter, which was furnished to us by the Office of the Attorney General of Alaska, with the Clerk of this Court.

factor in a judicial determination of whether Alaska's location system is really a leasing system" (Letter at 3). The 1982 amendments authorize the Commissioner to issue a "production license" to each locator of a mining claim who wishes to extract hard-rock minerals. Alaska Stat. § 38.05.205. Although a production license likewise is not conditioned upon payment of rents or royalties, the Attorney General was of the view that the 1982 amendments brought the State into compliance with the Statehood Act because a production license could be regarded as a "lease" for purposes of Section 6(i). Letter at 3-4. The Attorney General acknowledged that it would be better if the license were expressly termed a "lease," but he explained that "this additional cosmetic change proved impossible due to the miners' adamant and vocal opposition to the term" (*id.* at 3).

B. ***The Proceedings In This Case***

1. This suit was filed in state Superior Court in 1983 by the respondent environmental organizations, Native village corporations, and fishing association. They sought a declaratory judgment that the state statutory scheme for the mining of hard-rock minerals on land selected pursuant to Section 6(a) or (b) of the Statehood Act violates the "lease" requirement in Section 6(i) because the State does not receive rents or royalties in return for production licenses or leases and because the State construes the "lease" requirement to apply only to lands that were known to be mineral in character when they were selected. Comp. ¶¶ 40-46, 57-59; Prayer for Relief ¶¶ 1-3, 7.[7]

The trial court granted summary judgment in favor of petitioners (Pet. App. A1-A15). The court first held that respondents do not have standing to seek judicial review (*id.* at A5-A9), because "[o]n the evidentiary record in this case, [respondents] have * * * failed to establish the requisite individualized harm, direct interest, or personal stake in the mineral resources being managed under the statutory scheme challenged here" (*id.* at A5-A6). The court also found that respondents do not have

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[7] Respondents raised certain claims under the State Constitution as well (Compl. ¶¶ 47-56, 60-62), but the Alaska Supreme Court did not reach the state-law claims (Pet. App. B85) and they are not at issue here.

standing under a distinct state-law doctrine that permits a citizen or taxpayer to challenge state governmental action (*id.* at A6-A9). On the merits, the trial court held that because Section 6(i) provides that minerals are "subject to lease by the State as the State legislature may direct," the Alaska Legislature had discretion to permit the consideration for a lease (or production license) to be in the form of "services" (the annual labor necessary to maintain a mining claim), rather than cash rents or royalties (Pet. App. A9-A12).

2. On respondent's appeal, the Supreme Court of Alaska reversed and remanded for entry of a declaratory judgment that the state statutory scheme violates Section 6(i) and for other appropriate proceedings (Pet. App. B1-B86). The Supreme Court noted that respondents "assert that they have standing as citizens or taxpayers, rather than because their interests are injured" (*id.* at B9), and it held that respondents have standing in the former capacity (*id.* at B6-B26). The court rejected the State's argument that respondents are not appropriate plaintiffs as citizens or taxpayers because the Attorney General of the United States has authority to challenge the State's hard-rock mining system in a forfeiture proceeding brought under Section 6(i) of the Statehood Act. The court reasoned that respondents "are interested in preserving to the state the economic value of these lands," while the Attorney General "would be bringing an action for forfeiture of these lands, contrary to [respondents'] interest" (*id.* at B25-B26). The court also rejected the State's related contention that the authorization in Section 6(i) for the Attorney General to bring a forfeiture action constitutes an implied, federal-law preclusion of this declaratory judgment action in state court (Pet. App. B26-B31). The court pointed out that there has been much litigation in the courts of other States concerning restrictions on federal land grants (*id.* at B26-B27 & n.11), and it did not read the forfeiture provision in Section 6(i) to require a different result for Alaska (*id.* at B29-B31 & n.13). Indeed, the court believed that "[i]t would be unusual in the extreme if a state court could not construe the meaning of its state's Statehood Act" (*id.* at B31).

On the merits, the Supreme Court found Alaska's hard-rock mining statutes to be substantively "indistinguishable" from a

mineral location system (Pet. App. B70-B71), and it held that the state statutes "do not meet the leasing requirement of section 6(i)" because Section 6(i) "mandates a system under which the state must receive rent or royalties for its mining leases" (*id.* at B66-B67). Based on its exhaustive review of the legislative history of Section 6(i) (see Pet. App. B33-B67), the court concluded that "Congress * * * granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government" (*id.* at B56). In the court's view, "[t]he leasing restriction in section 6(i) was intended to further the goal of state revenue production" (*id.* at B58-B59), especially since Congress equated it with the leasing procedures under the Mineral Lands Leasing Act of 1920, which "reject[ed] the location system for certain minerals in order to provide revenue to the United States" (*id.* at B64-B65). The court also found it significant that the lease requirement in Section 6(i) was "copied advisedly" from the 1927 School Lands Act (*id.* at B59-B63), because the 1927 Act's leasing requirement "was expressly intended to be productive of proceeds, rents, and royalties" (*id.* at B64-B65) and because the laws of the States subject to the 1927 Act "are uniform in requiring the payment of rent, or royalties, or both" (*id.* at B65). Finally, the court rejected the contention that the performance of annual labor worth $200 satisfies the requirement of rents or royalties, since annual labor is required as evidence of good faith that the claim will be worked and "is not a source of revenue to the landowner" (*id.* at B70). The court did, however, agree with petitioners that the leasing requirement in Section 6(i) applies only to lands that were known to be mineral in character when they were selected by the State (*id.* at B71-B84).

3. After the petitions and conditional cross-petition for a writ of certiorari were filed in this Court, the Superior Court, on remand, issued an order and declaratory judgment dated November 9, 1987 (App., *infra*, 1a-8a). Because the Supreme Court's decision referred only to rents *or* royalties, the Superior Court rejected respondents' contention that the declaratory judgment should state that Alaska's statutory scheme must provide for payment of rents *and* royalties (*id.* at 3a-4a). The Superior Court also rejected respondents' contention that the

State must charge rents or royalties that reflect the "fair market value" of the hard-rock minerals in the land (*id.* at 4a). The court reasoned that Section 6(i) was intended to assure the State Legislature "substantial flexibility and discretion in fashioning some appropriate leasing system" (*ibid.*), and it read the Supreme Court's opinion to hold only that "the State has to charge *some* rents or royalties for extracted minerals, i.e., that the State was not free to impose *no* such charges on miners extracting minerals from state mineral lands" (*ibid.* (emphasis in original)). Finally, the Superior Court denied, as premature, respondents' request for an injunction barring the State from allowing extraction of mineral deposits from covered state lands after May 15, 1988 if the State Legislature did not enact a leasing system conforming to the Alaska Supreme Court's interpretation of Section 6(i) by that time (App., *infra*, 5a-6a).

DISCUSSION

Respondents do not satisfy the standing requirements of Article III of the Constitution, and this Court therefore does not have jurisdiction to entertain the petitions or cross-petition for a writ of certiorari. In any event, the issues raised by petitioners do not warrant review. The Supreme Court of Alaska correctly held that the courts of that State are not precluded by Section 6(i) of the Alaska Statehood Act from entertaining an action seeking a declaratory judgment regarding the validity of the State's hard-rock mining laws under Section 6(i). The courts of a number of other States have entertained similar suits, and a declaratory judgment action does not conflict with the Attorney General's distinct authority under Section 6(i) to bring an action for forfeiture of lands or minerals that are disposed of in violation of that Section. On the merits, the Alaska Supreme Court reasonably characterized the State's hard-rock mining laws as essentially a mineral location rather than a mineral leasing scheme, reasonably construed the "lease" provision in Section 6(i) to require the payment of at least some rents or royalties for the extraction of minerals, and reasonably concluded that the State's mining laws fail to satisfy that requirement because Alaska (unlike other western States) does not receive any cash payments for the extraction of hard-rock minerals. This unani-

mous holding that the State's own mining laws are inconsistent with the Alaska Statehood Act presents no issue warranting review by this Court.

By contrast, we find considerable merit in respondents' contention in their cross-petition that the Alaska Supreme Court erred in limiting the "lease" requirement in Section 6(i) to lands that were known to be mineral in character when they were selected by the State. However, because respondents request this Court to grant their cross-petition only if it grants the principal petitions, and because we believe that those petitions should be denied, the cross-petition should be denied as well.

1. Before addressing the questions presented in the petitions and cross-petition, we shall first address an important threshold question not raised by the parties: whether respondents have the Article III standing necessary to permit this Court to review the decision of the Alaska Supreme Court.[8] The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). In our view, respondents face obstacles under all aspects of this test.

The Superior Court found that respondents "have * * * failed to establish the requisite individualized harm, direct interest, or personal stake in the mineral resources being managed under the statutory scheme challenged here" (Pet. App. A5-A6). Respondents did not challenge that finding, and the Alaska

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[8] The holding below that respondents' declaratory judgment action is not barred by Section 6(i) and that Alaska's existing hard-rock mining laws are inconsistent with Section 6(i) would appear to be sufficiently "final" for purposes of this Court's review under 28 U.S.C. 1257, even though the Supreme Court remanded for the Superior Court to enter the declaratory judgment and that judgment on remand addressed several additional issues regarding the meaning of Section 6(i) that might be relevant to the validity of future amendments to the State's mining laws. Our only reservation on the finality issue arises from the fact that neither court below has yet addressed the availability of injunctive relief, which could raise additional federal issues under Section 6(i). See note 18, *supra*.

Supreme Court did not overturn it. In fact, the Supreme Court acknowledged that respondents "assert that they have standing as citizens or taxpayers, rather than because their interests are injured" (*id.* at B9).[9] Moreover, in holding that respondents have standing as citizens and taxpayers (*id.* at B8-B26), the Alaska Supreme Court did not rely upon the possibility that Alaska's hard-rock mining laws might have a financial impact on the taxpayers who are members or constituents of the respondent organizations. Rather, it appears that under the special standing doctrine applied by the Supreme Court, the mere status of an individual as a citizen or taxpayer is sufficient to give him a derivative interest or stake in significant legal issues concerning the performance of state governmental functions. Althought the courts of the States are not barred by the Federal Constitution from recognizing standing on such a theory, this Court has consistently held that an individual does not satisfy the standing requirements of Article III based on nothing more than his status as a citizen who is interested in the conduct of his government. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215-221 (1974); *United States* v. *Richardson*, 418 U.S. 166, 171-175 (1974); *Doremus* v. *Board of Education*, 342 U.S. 429, 433-435 (1952); *Frothingham* v.

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[9] The standing portions of respondents' brief (at 25-31) and reply brief (at 2-11) in the Alaska Supreme Court discussed only the taxpayer-citizen doctrine recognized by the Alaska Supreme Court in *State* v. *Lewis*, *supra*, and related cases. The briefs did assert that respondents had a "personal stake" in the outcome. But those assertions were made in the framework of the taxpayer-citizen standing doctrine under state-law precedents, and the "personal stake" that respondents alleged was entirely derivative of what respondents alleged to be the *State's* interest in realizing income from rental fees and royalties and avoiding the possible forfeiture of the land. See Appellants' Br. 25-26, 27; Reply Br. 2-3, 5 That stake is not "personal" in the sense of being unique to respondents; it is the interest shared by all taxpayers and citizens of Alaska in having their state government retain its assets and maximize its income from those assets.

Respondents also alleged in the Superior Court that their members or residents used state lands for recreational, commercial and subsistence purposes; that mining adversely affected those uses; and that placer mining polluted streams used by respondents' members and residents. Compl. ¶¶ 1-12. Neither the Superior Court nor the Alaska Supreme Court referred to those allegations of injury, and respondents did not rely on them in their briefs in the Alaska Supreme Court.

Mellon, 262 U.S. 447 (1923); cf. *Allen* v. *Wright*, 468 U.S. at 754-755, 756 n.21; *Valley Forge*, 454 U.S. at 482, 489-490 n.26.

Nor have respondents alleged that the State has spent tax revenues pursuant to a statute in direct contravention of a specific constitutional (or statutory) provision, such as the Establishment Clause, that restricts such expenditures. Compare *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968); see *Valley Forge*, 454 U.S. at 479-480; *United States* v. *Richardson*, 418 U.S. at 175. In fact, respondents do not challenge the lawfulness of any taxes or expenditures as such. They merely object to the failure of the State to collect additional, non-tax revenues from other persons. If that theory of standing were adopted, any taxpayer could challenge any actions that have monetary consequences for the government.

Under Article III, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision" (*Allen* v. *Wright*, 468 U.S. at 751, quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). In this case, respondents neither alleged in their complaint nor argued in the Alaska Supreme Court that there was a direct correlation between the amount of income the State receives from hard-rock mining on state lands and the amount of money that respondents' members and residents pay in state taxes. Compare *Allen* v. *Wright*, 468 U.S. at 758. Respondents accordingly do not deny that if the State in the past had received the increased mining revenues that respondents seek to compel in this suit, it is possible that the State Legislature would not have amended the State's tax code but instead would have used the increased revenues to furnish additional services, reduce a budget deficit, or increase a budget surplus. Any "injury" respondents' members and residents suffer as a result of the current rates of taxation therefore is not fairly traceable to the challenged action of the State in failing to charge rents and royalties. See *United States* v. *Richardson*, 418 U.S. at 171-172; *Flast* v. *Cohen*, 392 U.S. at 92-93; *Frothingham* v. *Mellon*, 262 U.S. at 487-488; see also *Winpisinger* v. *Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980). Nor would respondents necessarily receive relief from that

"injury" as a result of a decision in their favor in this case. To the contrary, respondents seek an injunction barring all hard-rock mining on state lands under the existing state statutes—relief that obviously would not generate additional revenues. Moreover, even if this suit should cause the State Legislature to amend the state statutes to impose rents and/or royalties in the future, many persons holding mining claims might forgo mining rather than make the payments. Compare *Allen* v. *Wright*, 468 U.S. at 758-759; *Eastern Kentucky Welfare*, 426 U.S. at 40-46. And even if some claimants did continue to mine, the increased revenues might not lead to lower taxes.

In sum, the decision of the Supreme Court of Alaska in this case was, for federal jurisdictional purposes, essentially an advisory opinion. That opinion might provide useful guidance to the Alaska Legislature as it seeks to conform its hard-rock mining laws to Section 6(i) of the Alaska Statehood Act, just as the 1981 Opinion of the Attorney General of Alaska led the Alaska Legislature to amend the State's hard-rock mining laws in 1981 and 1982 (see pages 7-9, *supra*). But the opinion is not subject to review here. This Court held in *Doremus* (342 U.S. at 434):

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

See also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985); *Secretary of State of Maryland* v. *J.H. Munson Co.*, 467 U.S. 947, 954 & n.4 (1984); *Revere* v. *Massachusetts General Hosp.*, 463 U.S. 239, 243 (1983). We therefore suggest that the Court deny certiorari because of this jurisdictional defect, as well as for the other reasons set forth below. If the Court denies review, then in any future suit in federal court—including a forfeiture action brought by the Attorney General of the United States—both petitioners and respondents presumably would be

free to relitigate the issues of federal law that were addressed by the Alaska Supreme Court in this case, since the district court in any such suit could not accept a proceeding in state court that did not constitute a case or controversy "as the basis for conclusive disposition of an issue of federal law" (*Doremus*, 342 U.S. at 434). See P. Bator, *et al., Hart & Wechsler's The Federal Courts and the Federal System* 128-129 (1973); cf. *Fidelity Nat'l Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 130-131 (1927).[10]

2. Petitioners' principal contention in this Court is that the state courts should not have entertained this suit, because respondents do not have an "implied right to action" under the Alaska Statehood Act to enforce the "lease" requirement of Section 6(i) and because the authorization for the Attorney General of the United States to bring a forfeiture action implicitly forecloses all private suits arising under Section 6(i). 87-206 Pet. 20-33; 87-205 Pet. 6-9. Both arguments fail.

a. We may assume for present purposes that, under the approach followed by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), and its progeny (see, *e.g., Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4-5), respondents do not have an implied private right of action under Section 6(i) that could be brought in federal district court under the general grant of federal question jurisdiction, 28 U.S.C. 1331. See Pet. App. A8-A9. Thus, we may assume that Section 6(i) was not enacted

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[10] It has been suggested that the language in *Doremus* quoted in the text could be read to mean that dismissal of the petition or appeal is appropriate only if the state supreme court *rejected* the federal constitutional challenge in a proceeding in which the plaintiff did not satisfy Article III's standing requirements, and that this Court properly could vacate a state court decision that *sustained* the federal constitutional challenge in such a proceeding. See *Barnes* v. *Kline*, 759 F.2d 21, 63 n.16 (D.C. Cir. 1984) (Bork, J., dissenting), vacated as moot, No. 85-781 (Jan. 14, 1987); L. Tribe, *American Constitutional Law* 114 n.20 (2d ed. 1988). We disagree. In our view, the *Doremus* passage makes clear that a federal court will not give preclusive effect to the unreviewed state court decision in a *future* case, not that this Court could vacate the state court decision on direct review in the *same* case, despite the absence of a case or controversy. The latter suggestion would have been inconsistent with the Court's explicit disclaimer of any suggestion that a state court is barred from rendering an advisory opinion on a federal constitutional question where Article III standing is lacking. 342 U.S. at 434.

for the special benefit of respondents or their members and residents, that the indicia of legislative intent do not reveal an affirmative congressional purpose to provide a private right of action under federal law, that a federal cause of action would not further the purposes underlying Section 6(i), and that respondents' cause of action is typically relegated to state law. Compare *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, No. 85-619 (July 7, 1986), slip op. 6-7. But the absence of a right to sue directly under federal law in federal court does not suggest that the state courts erred in entertaining this suit.

The Alaska Supreme Court did not hold that respondents have an implied private cause of action, as a matter of *federal* law, directly under Section 6(i). In fact, the Alaska Supreme Court did not discuss this Court's implied-right-of-action cases. Nor, as the State concedes (87-206 Pet. 31), did respondents assert that federal law afirmatively granted them a cause of action in the Superior Court; instead, respondents relied on the authority of that court, as one of general jurisdiction (see Alaska Stat. § 22.10.020(a) (1982)), to grant relief to the citizens of Alaska who are injured by the State's violation of federal law. See Appellants' Alaska Sup. Ct. Br. 31-32[11]; Reply Br. 6-9. In other words, respondents argued (and the Alaska Supreme Court apparently agreed) that *state* law provided respondents with a cause of action to challenge the validity of the State's hard-rock mining laws and to seek a declaratory judgment regarding the meaning of Section 6(i).

Because the Alaska Supreme Court did not purport to find a right of action under federal law, petitioners' contention cannot be that that Court misapplied this Court's implied-right-of-action precedents. Rather, it is that the Alaska Supreme Court

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[11] Quoting *In re C.D.M.*, 627 P.2d 607, 610 (Alaska 1981) (emphasis in original):

> Where a court is one of general jurisdiction, such as the superior court in the case at bar, it has traditionally been regarded as having the power to hear all controversies which may be brought before a court within the legal bounds of rights or remedies, except insofar as has been expressly and unequivocally *denied* by the state's constitution or statutes.

Accord *Siggelkow* v. *State*, 731 P.2d 57, 61 (Alaska 1987). The Superior Court has broad authority to issue declaratory judgments. See Alaska Stat. § 22.10.020(b); *Jefferson* v. *Asplund*, 458 P.2d 995 (Alaska 1969).

should have applied *Cort* v. *Ash* and its progeny, and that had it done so, it would have found that respondents do not have a cause of action under Section 6(i). See 87-206 Pet. 27-31; 87-206 Reply Br. 4-14; 87-205 Pet. 7-9. However, *Cort* v. *Ash* and this Court's other implied-right-of-action cases over that last fifteen years, including those cited by petitioners, all involved the question whether a plaintiff could bring an action in *federal* court based on a violation of a federal statute.[12] Petitioners cite no authority (and we are aware of none) for the proposition that *Cort* v. *Ash* and its progeny also restrict the power of a state court to entertain a state-created cause of action that includes as an element the violation of a federal statute. In fact, *Merrell Dow* demonstrates otherwise.

The plaintiffs in *Merrell Dow* brought a state-law tort suit in state court, seeking damages based on the alleged mislabeling of a drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. (& Supp. IV) 301 *et seq. Merrell Dow,* slip op. 1-2. The Court assumed that the FDCA did not grant the plaintiffs an implied cause of action that could be brought in federal court under 28 U.S.C. 1331 (slip op. 6-7), and the Court held that the plaintiffs' state-law cause of action likewise could not be removed to federal court merely because of the presence of a federal issue (the alleged violation of the FDCA) (*id.* at 1, 7, 10). However, the Court made clear that the plaintiffs *could* proceed with their suit in state court, even though they sought to recover damages based on a violation of the FDCA in circumstances where the FDCA itself did not provide an implied right of action for damages (*id.* at 11-12 & n.14; *id.* at 15

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[12] See, *e.g., National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453 (1974); *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979); *Universities Research Ass'n, Inc.* v. *Coutu,* 450 U.S. 754 (1981); *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U.S. 77 (1981); *California* v. *Sierra Club,* 451 U.S. 287 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *Jackson Transit Auth.* v. *Transit Union,* 457 U.S. 15 (1982); *Daily Income Fund, Inc.* v. *Fox,* 464 U.S. 523 (1984); *Massachusetts Mutual Life Ins. Co.* v. *Russell,* 473 U.S. 134 (1985); *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson, supra; Thompson* v. *Thompson, supra.*

(Brennan, J., dissenting)). See also *Thompson* v. *Thompson, supra* (no implied right of action in federal court to enforce full-faith-and-credit rules in custody disputes, although rules must be enforced in state court); *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166-167 (1969) (nonemployee's remedy for violation of Safety Appliance Act is state common-law tort suit, brought in state court and subject to state defenses and standards of causation); *Moore* v. *Chesapeake & O. Ry.*, 291 U.S. 205 (1934) (same); *Hart & Wechsler, supra,* at 488 ("federal law does not create the cause of action" under *Crane* and *Moore*). Accordingly, petitioners err in relying on this Court's decisions concerning the availability of an implied cause of action in federal court.[13]

b. The relevant question for present purposes therefore is not whether Congress has affirmatively granted respondents a right to sue directly under Section 6(i) of the Statehood Act, but whether Congress has affirmatively foreclosed the state courts from entertaining a state-created cause of action in which the interpretation of Section 6(i) is at issue—*i.e.*, whether the state cause of action is preempted by the Statehood Act. Compare *Moore,* 291 U.S. at 216 (proper question is whether federal statute "precludes" incorporation of federal safety standard into state law). In our view, the Alaska Supreme Court correctly held that Section 6(i) does not bar this declaratory judgment action in state court. See Pet. App. B26-B31.

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[13] For the same reason, Alaska also errs in relying on three appellate decisions finding no implied private right of action in federal court to enforce the provisions of two statehood Acts. See 87-206 Pet. 23-25, citing *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n,* 588 F.2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979); *Price* v. *Hawaii,* 764 F.2d 623, 631 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *Downer* v. *Graham,* 21 F.2d 732 (8th Cir. 1927). In the first two of these cases, the Ninth Circuit applied the *Cort* v. *Ash* analysis. *Downer* arose prior to *Cort* v. *Ash.* Although language in *Downer* suggests that restrictions in the Arizona-New Mexico Enabling Act (ch. 310, 36 Stat. 557) could not be enforced in a suit brought by a private party against a state official, that Act could not be read to foreclose such a suit in state court: as Alaska points out (87-206 Pet. 26 n.7), Section 28 of that Act (36 Stat. 575), which was not mentioned in *Downer,* expressly preserves the power of the State or any of its citizens to enforce the Act. See pages 23-24, *infra.*

Preemption of state law of course " 'is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." ' " *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 634 (1981) (citations omitted); see also *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715 (1985). A court should be especially reluctant to find preemption here. This is not a routine state-law damages action between private parties in a commercial or other context that is actively and pervasively regulated by federal law, such that entertaining a cause of action in state court might disarrange the federal regulatory scheme. This case, rather, involves the power of a State to confer on its citizens the right to invoke the jurisdiction of the state courts to sue the State itself, concerning the State's administration of vast expanses of land that were granted to it by Congress for the maintenance of the state government and the ultimate benefit of its citizens. Respondents' suit does not intrude upon any active and pervasive regulatory scheme of the Federal Government, which has no continuing jurisdiction over the more than 100,000,000 acres granted to the State; respondents seek merely to enforce certain requirements that were imposed directly on the State by the Statehood Act itself. It would be ironic indeed if the Statehood Act, whose very purpose was to accord sovereign status to the newly admitted State, were construed implicitly to withdraw from the State so central a sovereign prerogative as the power to permit its citizens to petition their government, through its courts,[14] for redress of grievances concerning an entire subject matter of such importance to the State and its people.[15]

Petitioners point to no evidence that Congress intended that extraordinary result. Moreover, the courts of a number of States have entertained suits by taxpayers and other alleging

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[14] Cf. *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U.S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972).

[15] The Supreme Court of Alaska similarly observed that "[i]t would be unusal in the extreme if a state court could not construe the meaning of its state's Statehood Act" (Pet. App. B31).

that actions by state officials with respect to lands granted by a statehood act are inconsistent with the statehood act. See, *e.g.*, *Springfield Township* v. *Quick*, 63 U.S. (22 How.) 56 (1860) (plaintiff township's citizens were beneficiaries of school land grant); *Kadish* v. *Arizona State Land Dep't*, 747 P.2d 1183 (Ariz. 1987) (taxpayer plaintiffs); *Merkwan* v. *State by and through Janklow*, 375 N.W.2d 624 (S.D. 1985) (taxpayer); *Kanaly* v. *State by and through Janklow*, 368 N.W.2d 819 (S.D. 1985) (taxpayers and citizens); *County of Skamania* v. *State*, 102 Wash. 2d 127, 685 P.2d 576 (1984) (county beneficiary of school land grant); *Oklahoma Education Ass'n* v. *Nigh*, 642 P.2d 230 (Okla. 1982) (education association); *State ex rel. Hughes* v. *State Board of Land Commissioners*, 137 Mont. 510, 515-519, 521-523, 353 P.2d 331, 335-336, 338 (1960) (apparently a citizen); *Toomey* v. *State Board of Land Commissioners*, 106 Mont. 547, 559-563, 81 P.2d 407, 413-415 (1938) (taxpayer); *State ex rel. Ebke* v. *Board of Educational Land & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) (disappointed lease applicant); *Ross* v. *Trustees of University of Wyoming*, 30 Wyo. 433, 222 P. 3 (1924) (university that was beneficiary of school land grant).

Contrary to petitioners' contention (87-206 Pet. 19, 26-30), there is no reason to believe that Congress intended a different and unique rule in Alaska simply because Section 6(i) authorizes the Attorney General of the United States to bring an action for forfeiture of any lands or minerals that are disposed of contrary to Section 6(i). Petitioners cite no legislative history suggesting that this authorization was intended to preclude other litigation, in state court, concerning the meaning of Section 6(i).[16] It is, in

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[16] The potential breadth of petitioners' preclusion argument is unclear. For example, in a suit under a state equivalent of the Administrative Procedure Act (5 U.S.C. (& Supp. IV) 701 *et seq.*), a disappointed applicant might wish to challenge the state agency's award of a mining permit or lease to another applicant on the ground that it failed to comply with state standards as well as Section 6(i); could Congress have meant to foreclose the state court from considering the federal issue in the action for judicial review? If land was mistakenly conveyed to a private party without reservation of mineral interests to the State, would the Attorney General of Alaska be barred from bringing an action in state court to cancel the patent on the ground that it was void under Section 6(i)? Would the state courts be barred from entertaining a quiet title action between private parties where the issue of ownership turned on a construction of Section 6(i)?

fact, most unlikely that Congress intended to divest the state courts of their authority to guide the State in the performance of its trust responsibilities (cf. *United States* v. *Mason*, 412 U.S. 391, 399 (1973)) and instead to vest the Attorney General of the United States with the exclusive (and paternalistic) responsibility to oversee all aspects of the State's performance.

Nor does private litigation—and especially a declaratory judgment action—interfere with the Attorney General's enforcement authority under Section 6(i), any more than the opinions of the Attorney General of Alaska in 1981 and 1982 construing Section 6(i) interfered with that authority. Forfeiture under Section 6(i) obviously was intended as an ultimate sanction to protect the interests of the United States if the restrictions it imposed are violated; respondents, by contrast, seek to prevent a violation of those restrictions from occurring and thereby to avoid any occasion for forfeiture, so that the land may be preserved for the State and its citizens, as Congress intended (Pet. App. B25-B26). The Attorney General does not have the resources necessary to monitor the administration and disposition of the millions of acres of land that were granted to the States. Suits by private parties and beneficiaries of the trusts can furnish an important means for ensuring that the limitations imposed by Congress are respected. Compare *Cannon* v. *University of Chicago*, 441 U.S. at 687-688 n.8, 704-708 (discussing the relationship between private suits to enforce anti-discrimination provisions and fund-termination actions by federal agencies).[17]

In addition, in the Arizona-New Mexico Enabling Act, which was the last statehood act passed by Congress prior to the Alaska Statehood Act, Congress authorized the Attorney General to bring any action (not merely one seeking forfeiture) to enforce its provisions and expressly provided that nothing in the Act "shall be taken as in limitation of the power of the state

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[17] For similar reasons, there is no reason to believe that Congress would have wanted the federal courts to have exclusive jurisdiction over suits under Section 6(i). See 87-205 Pet. 10-11, citing *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981). As this case demonstrates, state courts are not inhospitable to federal claims under Section 6(i), and there is no distinct need for uniformity or for the expertise of federal judges. See 453 U.S. at 483-484.

or of any citizens thereof to enforce the provisions of this Act" (§ 28, 36 Stat. 575). This provision sanctions the availability of whatever remedies might be afforded outside the Enabling Act; it does not confer a right directly under that Act, as Alaska contends (87-206 Pet. 26 n.7). There is no reason to believe that Congress intended to treat the State and citizens of Alaska any differently, by foreclosing a right action that would otherwise be available in the courts of Alaska concerning lands granted by the Alaska Statehood Act.[18]

3. In addition to arguing that the state courts were without authority to entertain this suit, petitioners also contend (87-206 Pet. 33-38; 87-205 Pet. 12-13) that the Alaska Supreme Court erred in holding that the State's hard-rock mining laws do not satisfy the "lease" requirement in Section 6(i) because they do not provide for payment of cash rental fees or royalties to the State. In our view, however, the Alaska Supreme Court's unanimous ruling on this issue is correct, and indeed petitioners offer virtually no rebuttal to that Court's extensive analysis. For this reason, and because the ruling below does not conflict with the decision of any other state or federal court, review on this issue is not warranted.

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[18] The State relies (87-206 Pet. 21-22) on a passage in *Mills County* v. *Railroad Cos.*, 107 U.S. 557 (1883), that discussed the requirement in the Swamplands Act that the proceeds of the States' sales be used for reclamation of such lands; the Court stated that whether that condition was faithfully performed was "a question between the United States and the States, and is neither a trust following the lands, nor a duty which private parties can enforce as against the State" (107 U.S. at 566). *Mills County* did not purport to lay down a general rule that all statutory grants to the States are unenforceable in suits by private parties; the decision turned in part on the Court's conclusion that the particular grant there at issue committed expenditures largely to the State's discretion, as evidenced by the directive to use the funds for reclamation "as far as necessary." See *Hagar* v. *Reclamation Dist. No. 108*, 111 U.S. 701, 713 (1884). Here, in contrast to *Mills County*, the "lease" requirement in Section 6(i) is not discretionary, and the grant of 103,000,000 acres to Alaska pursuant to the Statehood Act did create a relationship in the nature of a trust. In addition, the state courts in this case have so far awarded only declaratory relief; they have not yet actually "enforced" Section 6(i) by granting injunctive relief. Finally, *Mills County* arose prior to Congress's express recognition of private suits to "enforce" restrictions on federal grants to the States when it enacted the Arizona-New Mexico Enabling Act in 1910.

a. Use of the term "lease" in Section 6(i) itself suggests a requirement that the State realize at least some revenue, because "[t]he legal understanding of a lease for years is, a contract for the possession and profits of land for a determinate period, with the recompense of rent." *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840). This interpretation of Section 6(i) is reinforced by the various factors identified by the Alaska Supreme Court: (1) the legislative history demonstrating that Section 6(i) was intended to assure financial support for the State (Pet. App. B51-B67); (2) the parallel drawn in the legislative history between the "lease" requirement in Section 6(i) and the Mineral Lands Leasing Act of 1920, which requires payment of both rentals and royalties (Pet. App. B64-B65 & n.27)[19]; (3) the patterning of Section 6(i) after the 1927 School Lands Act, which expressly contemplates that the States will realize "proceeds and rents and royalties" from the leasing of mineral lands (43 U.S.C. 870(b); see Pet. App. B29-B30, B39-B43, B63-B64); and (4) the fact that Section 6(i) was intended to put Alaska on a par with other western States, which uniformly require the payment of rents and/or royalties (see Pet. App. B63 n.25, B65-B66, quoting 3 *American Law of Mining* § 63.05[4][d] (Rocky Mtn. Min. L. Inst. 2d ed. 1987)).[20]

b. In addition, the history of the State's hard-rock mining laws (see pages 2-7, *supra*) demonstrates that they were not enacted with a view toward complying with the basic requirements of the "lease" provision in Section 6(i). Congress deliberately declined to authorize mining under a mineral location system, as petitioner AMA and many delegates to the Alaska Constitutional Convention had urged. See pages 4-6, *supra;* Pet. App. B34-B36 & n.16, B39-B54. Nonetheless, the Alaska Legislature enacted the State's hard-rock mining laws in 1959 as a mineral location system, not a mineral leasing system.

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[19] See also *1957 Hearings, supra* note 2, at 222-223 (witness for petitioner AMA acknowledges that under the "mandatory leasing" provisions of Section 6(i), a lease "would be probably on a royalty basis").

[20] See, *e.g.*, Ariz. Rev. Stat. Ann. § 27-234 (Supp. 1987); Colo. Rev. Stat. § 36-1-113 (Supp. 1987); Idaho Code § 47-704 (Supp. 1987); Mont. Code Ann. §§ 77-3-115, 77-3-116 (1988); Nev. Rev. Stat. § 322.030 (1985); N.M. Stat. Ann. §§ 19-8-21, 19-8-22 (1985); Utah Code Ann. § 65-1-18 (1986).

And the Legislature followed that course not on the premise that a location scheme complied with Section 6(i), but on the premise that the "lease" requirement in Section 6(i) was inapplicable, except in those limited instances in which selected lands were subsequently sold (for which the Legislature authorized a special leasing scheme) See pages 6-7, *supra.*

The Attorney General of Alaska concluded in 1981 that the State's original interpretation of the "lease" requirement in Section 6(i) was incorrect and that it applies to all mineral lands selected by the State. See page 7, *supra.* It is that Attorney General's opinion, not the decision of the Alaska Supreme Court in this case, that unsettled whatever expectations mining interests and others in Alaska might have had. Yet the State Legislature accepted that interpretation when it amended the State's hard-rock mining laws in 1981, and that interpretation is not at issue here. The 1981 amendments now do provide for mineral "leases" on all selected lands that were known to be mineral in character when they were selected by the State; but those amendments have never been invoked, because the State has never made the requisite formal finding that any particular tract was known to be mineral in character when it was selected. See pages 7-8, *supra.* Moreover, the Alaska Supreme Court concluded in this case that any leases issued under those provisions would be "in substance indistinguishable from state mining locations" (Pet. App. B70-B71 (footnote omitted)), because the right to lease is conditioned upon a mining location, because no royalties are charged for the extraction of minerals, and because the annual rent is set at the amount of labor required to maintain a mining location for the same claim (*id.* at B68-B70). Thus, the holding below rests in large part on the Alaska Supreme Court's determination that the State Legislature intended to and did enact what is fundamentally a mineral location system for hard-rock minerals—the very approach Congress rejected when it enacted Section 6(i). We have no reason to disagree with this assessment by the Alaska Supreme Court of the Alaska Legislature's actions.

c. Petitioners rely on a statement in a 1955 memorandum prepared by a Mr. Slaughter of the Solicitor's Office in the Department of the Interior on the then-pending statehood bill

(see Pet. App. C1-C11), which stated that what is now Section 6(i) " 'does not attempt to prescribe maximum or minimum rates of royalty' " and that it " 'leave[s] the terms of leasing wholly to the discretion of the state legislature' " (87-206 Pet. 35-36, quoting Pet. App. C15). Based on this passage, the State argues (87-206 Pet. 36) that there are no restraints on the Alaska Legislature in fashioning laws governing the disposition of minerals (beyond the prohibition against issuing a patent for the minerals). The Alaska Supreme Court correctly rejected a broad reading of the Slaughter memorandum that would suggest that the State need not collect *any* rents or royalties—especially since the memorandum also states that " 'Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants' " (Pet. App. B69 n.29, quoting *id.* at C5; see also *id.* at C10): other States are governed by the 1927 School Lands Act, which expressly contemplates the receipt of proceeds and rents and royalties from mineral leasing. See page 25 and note 20, *supra.*[21] The Alaska Supreme Court also reasonably concluded that a mining claimant's performance of $200 worth of labor annually to maintain his mining claim does not satisfy the requirement under Section 6(i) that the State receive at least some rents or royalties from mineral leasing. As the Alaska Supreme Court observed, annual labor is required under mineral location laws "to ensure that the claim is worked so that the miner does not locate numerous claims and obtain the right to exclude others"; it "is not a source of revenue to the landowner" (Pet. App. B70, citing *Chambers* v. *Harrington,* 111 U.S. 350, 353 (1884)).

d. Neither the Alaska Supreme Court nor the Superior Court on remand prescribed a specific amount of rents or royalties that must be paid pursuant to a lease under Section 6(i). They properly left determination of the amount to the Alaska Legislature in the first instance, now that Alaska's Supreme Court has disabused its Legislature of the notion that Section 6(i) permits the State to retain a statutory scheme that

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[21] Moreover, under this interpretation, Alaska presumably would be free, as a matter of federal law, to dispense with the payment of rents and royalties for the extraction of oil and gas from the substantial reserves underlying lands granted to the State by the Statehood Act.

is, in substance, a mineral location system, rather than a true "lease" system. Resolution of any questions concerning the permissible contours of a true "lease" system under Section 6(i) should await future amendments by the Alaska Legislature.

4. There is considerable force to respondents' contention in their cross-petition (87-371 Cross-Pet. 9-20) that the Alaska Supreme Court erred in holding that Section 6(i) applies only to lands that were known to be mineral in character when they were selected by Alaska (Pet. App. B71-B84). Section 6(i) states that "[a]ll grants" made by the Act "shall include mineral deposits"; that the grants under Section 6(a) or (b) are made on the condition that all dispositions shall be subject to a reservation of mineral interests to the State; and that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." There is no indication that this all-inclusive language was intended to apply only to those lands whose mineral character was known when they were selected. To the contrary, as respondents point out (87-371 Cross Pet. 16-17), a provision that would have required the mineral character of the land to be determined when the patent issued to the State was deleted by the House Committee. See Pet. App. B79-B82. Moreover, the underlying purpose of Section 6(i)—to furnish a substantial financial base for the State—suggests that its all-inclusive language means what it says.

Despite the reference in the first sentence of Section 6(i) to the inclusion of mineral deposits in "[a]ll grants," the Alaska Supreme Court held that deposits *unknown* at the time of selection were not covered by Section 6(i) and instead were included in the grants of land made by Section 6(a) or (b). The Court reasoned that lands that were not known to be mineral in character were included in the original grants of school sections to other States and that the purpose of the 1927 Act, on which Section 6(i) was based, was only to include known mineral lands in those grants. See Pet. App. B43-B45, B72-B76. In those other States, however, the exclusion from the 1927 Act of lands whose mineral character was not known at the time of statehood did not reflect a decision by Congress to exempt the mineral deposits in such lands from *all* restrictions on their use and disposition. Lands whose mineral character was unknown at the time of statehood were not covered by the 1927 Act because

they were *already* part of the original grant of school lands made by the relevant statehood Act itself (cf. *United States* v. *Wyoming*, 255 U.S. 489, 500-501 (1921); *United States* v. *Sweet*, 245 U.S. 563, 572-573 (1918)); for this reason, any mineral deposits that were later discovered in such lands while they remained in state ownership presumably were *already* subject to the requirements in the relevant statehood Act that the lands be held in trust and be disposed of for school purposes. By contrast, the Alaska Supreme Court's decision limiting the reach of Section 6(i) appears to have the effect of excluding mineral deposits in lands whose mineral character was not known at the time of selection from *all* restrictions, and of allowing the States to give away the hard-rock minerals in such lands—unless Section 6(a) or (b) of the Statehood Act also imposes a trust obligation on the State to exact some rental or royalty payments for the extraction of minerals from lands selected by the State pursuant to those provisions.

Of course, even if the application of Section 6(i) does not turn solely on knowledge concerning the mineral character of particular land at the time it was selected (or the patent was issued (see Pet. App. B84 n.33)), the State might be free to classify land definitively as either mineral or non-mineral at a later date, such as immediately prior to a proposed sale or lease. But it does not necessarily follow that Section 6(i) should be construed to exclude lands in which mineral deposits are discovered by a mining claimant prior to such a formal classification and prior to any sale, lease or other disposition by the State, simply because those deposits were not identified at the time the lands were selected by or patented to the State, perhaps many decades earlier.

We do not propose here a definitive view of the proper interpretation of Section 6(i) in this regard. Respondents have filed their cross-petition on a conditional basis, urging that it be granted only if the Court grants the principal petitions filed by the State and the Alaska Miners Association. See 87-371 Cross Pet. 9-10; Trustees Br. in Opp. 10 n.3. Because we believe that the principal petitions should be denied, we submit that the cross-petition should be denied as well (see this Court's Rule 20.5). That course would permit the Alaska Legislature to address the issues raised by the cross-petition when it considers

whatever amendments to the State's mining laws it believes are required by the Alaska Supreme Court's decision on the other issues in the case.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case Civ. No. 3AN-83-9862

TRUSTEES FOR ALASKA; NUNAM KITLUTSISTI; DINYEA CORPORATION; VILLAGE OF MINTO; ALASKA INDEPENDENT FISHERMEN'S MARKETING ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SOUTHEAST ALASKA CONSERVATION COUNCIL; FRIENDS OF THE EARTH, PLAINTIFFS

vs.

STATE OF ALASKA; ALASKA DEPARTMENT OF NATURAL RESOURCES, ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

ALASKA MINERS ASSOCIATION, FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, DEFENDANTS–INTERVENORS

ORDER

1. ***Procedural Background***

The issues presented in this action were originally addressed by this Court through rulings on cross-motions for summary judgment. Such rulings were then appealed to the Alaska Supreme Court, which reversed this court's rulings, and held that the parties had standing to litigate the issues herein, that the state's mineral leasing system violated Section 6(i) of the Statehood Act insofar as it did not require miners to pay "rents or royalties" on mining leases, and that the Section 6(i) restrictions applied only to those lands known to have been mineral in character at the time the lands were selected by the state. *Trustees for Alaska v. State,* 736 P.2d 324 (Alaska 1987). The Alaska Supreme Court then remanded this action to this Court with the express direction to "enter a declaration in

accordance with [its] opinion and for such other and further proceedings as may be appropriate." *Id.* at 342.

Pursuant to such remand, and on May 24, 1987, this Court ordered plaintiffs Trustees for Alaska to submit a proposed order and declaratory judgment form consistent with the Alaska Supreme Court's aforementioned decision. Plaintiffs submitted such proposed order on July 10, 1987, and thereafter, defendant State and defendant-intervenors Alaska Miners Association opposed the order, objecting to specific portions thereof.

Meanwhile, defendant State and defendant-intervenor sought further appellate review of the Alaska Supreme Court's decision by filing petitions for writs of certiorari with the United States Supreme Court. Plaintiff Trustees subsequently filed a cross-petition for a writ of certiorari. The parties' various petitions are still pending at this time.

Given the pending petitions before the United States Supreme Court, defendant and defendant-intervenor filed a Motion to Suspend Proceedings with this Court on September 11, 1987, essentially seeking a stay of further proceedings before this Court until such time as the United States Supreme Court acted upon the pending petitions.

Arguments on plaintiffs' proposed declaratory judgment form and order, and defendants' Motion to Suspend Proceedings were heard by this Court on October 28, 1987. In the instant order, the Court rules on the parties' objections, arguments and motion as set forth below.

2. ***Defendants' Motion to Suspend Proceedings.***

Defendants' motion is denied.

This court interprets the Alaska Supreme Court's instructions on remand to be a direct order from the appellate court to the lower court to take certain action. Thus construed, this Court concludes that it has no discretion to refrain from following the appellate court's direction, and that it is obliged to attempt to implement, in good faith, the order of the higher court. Accordingly, this Court has held "such other and further proceedings" on plaintiffs' proposed order and declaratory judgment form,

and defendants' objections thereto, and has issued a declaratory judgment which the Court believes to be consistent with the Alaska Supreme Courts' decision in this case. In this Court's view, any request by any party to stay or "suspend" the implementation of the Alaska Supreme Court's decision, pending action by the United States Supreme Court on the parties' petitions for writs of certiorari, should be addressed to the Alaska Supreme Court.

3. ***Proposed Declaratory Judgment Form and Injunction.***

The Court has issued a revised version of plaintiffs' proposed declaratory judgment form. The parties' objections, and the Court's revisions, are addressed separately below.

a. "*Rents or Royalties*"

Plaintiffs' proposed declaratory judgment contains the language "rents *and* royalties." Plaintiffs argue such language reflects the essence of the Alaska Supreme Court's holding, and that the Court intended that the State is not free to adopt one form of compensation to the exclusion of the other. Defendants contend that the Alaska Supreme Court used the language "rents *or* royalties" with precision in its appellate decision, and that the Court is, in effect, giving defendant State the discretion to fashion whatever compensation system it deems appropriate.

This Court agrees with defendants' interpretation of the Alaska Supreme Court's decision. In its opinion, the Alaska Supreme Court discusses "the leasing systems of other states", noting that they differ from the federal leasing system but that they are "uniform in requiring the payment of rent, *or* royalties, *or* both." *Id.* at 338. (Emphasis added). The Supreme Court went on to acknowledge and discuss that such state leasing systems can be categorized into two types: one which requires the payment of both rents and royalities, but which credits the former against the latter or which ceases rent payments when the payment of royalties begins; and the second which separately requires the payment of *both* rents and royalties, independent of one another. *Id.* In construing Section 6(i) of the Statehood Act, the Court considered such differing mineral leasing systems

of other states and concluded that Section 6(i) "mandates a system under which the states must receive rent *or* royalties for its mineral leases." *Id.* (Emphasis added). This Court concludes that, in using such language, the Alaska Supreme Court intended to give the State the flexibility to fashion whichever leasing system it chose—whether allowing the crediting of rents against royalties or requiring the payment of both rents and royalties. The only thing which the State is *not* free to do, however, is to adopt a system which charges *no* rents or royalties for the extraction of minerals from state mineral lands. *Id.* at 338 n. 29.

In this Court's view, the Alaska Supreme Court carefully chose, and intended to use, the precise language "rents or royalties." Accordingly, this Court has used such language in the declaratory judgment issued herewith.

b. "*Fair Market Value*"

Plaintiffs' proposed declaratory judgment form suggests, and defendants object thereto, that the leasing system adopted by defendant State must charge rents or royalties reflective of the "fair market value of the hardrock mineral resources" of the State.

As noted above, this Court interprets the Alaska Supreme Court's decision in this case as recognizing that the State has substantial flexibility and discretion in fashioning some appropriate leasing system requiring the payment of "rents or royalties" for the extraction of minerals. The Alaska Supreme Court did not mandate that a particular valuation approach must be used by the State in setting such "rents or royalties." Rather, the only requirement imposed upon the State, by the Alaska Supreme Court as this Court interprets the appellate decision, was that the State has to charge *some* rents or royalties for extracted minerals, i.e., that the State was not free to impose *no* such charges on miners extracting minerals from state mineral lands. Accordingly, this Court has declined to incorporate any particular valuation standard or requirement, such as the proposed "fair market value" requirement of plaintiffs' proposed order, into its declaratory judgment.

c. *Determination of Mineral Character of State Lands*

Defendants object to that portion of plaintiffs' proposed declaratory judgment form which refers to "all state lands" as well as "hardrock" mineral resources.

As this Court interprets the Alaska Supreme Court's decision, the appellate court specifically considered, and rejected, the argument that the leasing system should apply to "all lands" where mineral are found. *Id.* at 341. Rather, the Supreme Court concluded that the restrictions of Section 6(i) "were intended to apply only to lands whose mineral character was known at the time of selection." *Id.* Further, the Court characterized such mineral resources as "mineral deposits." *Id.* at 339. Finally, the Court acknowledged that the "all lands" test might avoid "administrative problems" in determining the mineral character of land at the time of selection, but nevertheless rejected such test in its final holding on this issue.

This Court, therefore, has substituted the terms "lands whose mineral character was known at the time of selection" for "all state lands", and "mineral deposits" for "hardrock mineral resources" in plaintiffs' proposed judgment form. Similarly, the Court has declined to specify any particular methodology or process for the identification of such lands, or any definition of "mineral deposits', but instead defers to the State and/or the legislature in this respect.

d. *Injunction*

Plaintiffs' proposed declaratory judgment and order contain a prospective injunction, which would enjoin the State from allowing the extraction of mineral deposits from appropriate state lands after May 15, 1988, *if* a leasing system conforming to the Supreme Court's interpretation of Section 6(i) has not been adopted or enacted. Defendants contend that no injunction should issue since no imminent harm is about to occur. Defendants argue that mining activity realistically is not conducted during the winter months, that the issuance of an injunction would be premature at this point, and that the Alaska Legislature

should be given an opportunity to enact an appropriate leasing system during the next legislative session.

The Court agrees with defendants that the issuance of any injunction at this time would be premature and inappropriate. The Court thus declines to issue any injunctive relief in connection with the instant declaratory judgment. Should the State and/or Legislature fail to adopt an appropriate leasing system by the time the next mining season is about to commence, any party is free to return to this Court with a proper application for injunctive relief at such time.

4. *Attorneys' Fees.*

Insofar as this litigation is a "public interest litigation", and plaintiffs are "public interest litigants", the Court will allow an award of full, reasonable attorneys' fees and costs to plaintiffs regarding this litigation. Plaintiffs shall submit their application for fees and costs, along with detailed supporting documentation, pursuant to Rules 82 and 79. All parties will have an opportunity to brief such isues in accordance with applicable Civil Rules.

Dated this 9 day of November, 1987.

/s/ DOUGLAS J. SERDAHELY
Douglas J. Serdahely

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case Civ. No. 3AN-83-9862

TRUSTEES FOR ALASKA; NUNAM KITLUTSISTI; DINYEA CORPORATION; VILLAGE OF MINTO; ALASKA INDEPENDENT FISHERMAN'S MARKETING ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SOUTHEAST ALASKA CONSERVATION COUNCIL; FRIENDS OF THE EARTH, PLAINTIFFS

vs.

STATE OF ALASKA; ALASKA DEPARTMENT OF NATURAL RESOURCES, ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

ALASKA MINERS ASSOCIATION, FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, DEFENDANTS–INTERVENORS

DECLARATORY JUDGMENT

Pursuant to the remand in this action by the Alaska Supreme Court in *Trustees for Alaska v. State,* 736 P.2d 329 (Alaska 1987), this Court has considered the Supreme Court's decision, plaintiffs' proposed declaratory judgment order and defendants' and defendant-intervenors' responses thereto. The Court finds and declares as follows:

1. The State of Alaska's current system allowing the extraction of mineral deposits from state lands, AS 38.05.185 *et seq.*, violates Section 6(i) of the Alaska Statehood Act because it does not require the payment of rents or royalties from state lands whose mineral character was known at the time of state selection.

2. To comply with Section 6(i) of the Alaska Statehood Act, the State's mineral leasing system must include some process for determining which lands were of known mineral character at the time of selection and must further require the payment of rents

or royalties for the extraction of mineral deposits from such lands.

3. Plaintiffs, as successful public interest litigants in this action, are entitled to their full, reasonable attorneys' fees and costs incurred during the litigation of this case. Plaintiffs shall file a proper application for attorneys' fees and costs along with detailed documentation therefor, pursuant to Civil Rules 82 and 79.

DATED this 9th day of November, 1987.

/s/ DOUGLAS J. SERDAHELY
Douglas J. Serdahely
Superior Court Judge

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